

The issues raised on review by the respondent include the nature and extent of disability and the determination of the claimant's average weekly wage.

The issue raised on review by the claimant is entitlement to additional temporary total disability compensation for the time period from October 31, 1997, through March 10, 1998.

FINDINGS OF FACT & CONCLUSIONS OF LAW

Having reviewed the evidentiary record filed herein, and the stipulations of the parties, the Board makes the following findings of fact and conclusions of law:

Betty L. Augustine started working for respondent on April 10, 1997. She was a log book checker. She verified loads with the driver's log book to make sure the logs were accurate. The claimant would enter this information onto the computer and figure the driver's log hours and pay.

On April 23, 1997, the claimant pulled out a file and when she sat down, she thinks her leg must have bumped the chair and it rolled from underneath her. The claimant fell, hitting her chin on the desk and then she fell backwards landing on the concrete floor on her elbow, back and head.

The claimant sought treatment with Dr. Yoder, a chiropractor, the following day. She complained of pain in her back, neck, jaws, teeth and her left arm. Claimant saw Dr. Yoder three times that week for chiropractic treatments to her neck, shoulder and hip. Claimant requested Dr. Yoder bill her health insurance and when he would not, because it was work-related, claimant then sought chiropractic treatment from Dr. Wilbeck.

The claimant testified she was afraid that if she turned the medical bills in to the respondent as work-related she would be fired. The claimant testified that on approximately May 15 or 16, when she advised respondent that Dr. Wilbeck was taking her off work for a week, she was fired.

The claimant continued to treat with Dr. Wilbeck until the respondent's workers compensation insurance carrier referred her to Dr. Eyster on June 4, 1997. Following a course of conservative treatment including physical therapy, Dr. Eyster opined claimant had reached maximum medical improvement and he further recommended that claimant might benefit from a psychiatric evaluation.

The claimant returned to Dr. Eyster on August 12, 1997, and the doctor at that time imposed restrictions that claimant avoid overhead work, no pushing or pulling repetitively over 10 pounds and that she stretch every 30 minutes. Dr. Eyster released claimant on September 19, 1997, with temporary restrictions to continue for six months. The claimant

testified that when released by Dr. Eyster she was still in pain and consequently sought additional treatment on her own from Dr. Munhall.

Nature and Extent of Disability

Dr. Eyster released the claimant as being at maximum medical improvement but continued temporary restrictions for six months. He concluded she had not sustained any permanent impairment as a result of her work-related accident.

The claimant was examined by Dr. Zimmerman on June 15, 1999, at her counsel's request. Dr. Zimmerman diagnosed the claimant with a permanent aggravation of osteoarthritis affecting the cervical spine and rated the condition at 21 percent permanent partial impairment to the body. He further concluded the claimant sustained a permanent aggravation of osteoarthritis affecting the left shoulder which the doctor concluded resulted in a 21 percent permanent partial impairment of the left upper extremity which converts to a 13 percent whole body rating. Using the combined values chart of the *AMA Guides*, the doctor opined the claimant had sustained a 31 percent permanent partial functional impairment to the whole body.

Dr. Zimmerman determined claimant was capable of lifting 20 pounds occasionally and 10 pounds frequently. Dr. Zimmerman noted claimant should avoid hyperflexion, hyperextension or captive positions of her cervical spine. The doctor further recommended claimant should avoid work activity at shoulder height or above on the left side and she should avoid frequent flexion, extension, twisting, torquing, pushing, pulling, and hammering activities with the left upper extremity.

As a result of these conflicting opinions, the Administrative Law Judge referred the claimant to Dr. Drazek for an independent medical evaluation. Following her initial examination of the claimant on December 1, 1999, Dr. Drazek's primary diagnosis was chronic pain syndrome including myofascial pain involving the cervical region and low back pain. Dr. Drazek concluded claimant fit DRE Category II, consistent with a 5 percent whole person impairment. Dr. Drazek opined the claimant could tolerate light-duty work with the avoidance of lifting greater than 10-15 pounds on a repetitive basis and 20-25 pounds on an occasional basis. In addition, Dr. Drazek noted claimant should avoid repetitive movement of the neck and repetitive use of the left upper extremity.

Dr. Drazek further recommended that neuropsychological testing be performed. As a result the claimant was evaluated by Dr. Woltersdorf on February 22, 2000. Dr. Woltersdorf filed an extensive report which concluded that although claimant had a histrionic personality disorder, there was no indication of malingering.

The Board concludes the opinion of the court appointed medical examiner is more persuasive and adopts the Administrative Law Judge's finding that as a result of her work-related injury the claimant has sustained a 5 percent functional impairment.

Because hers is an “unscheduled” injury, claimant’s permanent partial general disability is determined by the formula set forth in K.S.A. 1996 Supp. 44-510e. That statute provides:

The extent of permanent partial general disability shall be the extent, expressed as a percentage, to which the employee, in the opinion of the physician, has lost the ability to perform the work tasks that the employee performed in any substantial gainful employment during the fifteen-year period preceding the accident, averaged together with the difference between the average weekly wage the worker was earning at the time of the injury and the average weekly wage the worker is earning after the injury. In any event, the extent of permanent partial general disability shall not be less than the percentage of functional impairment. . . . An employee shall not be entitled to receive permanent partial general disability compensation in excess of the percentage of functional impairment as long as the employee is engaging in any work for wages equal to 90% or more of the average gross weekly wage that the employee was earning at the time of the injury.

But that statute must be read in light of *Foulk*¹ and *Copeland*.² In *Foulk*, the Court held that a worker could not avoid the presumption of having no work disability as contained in K.S.A. 1988 Supp. 44-510e by refusing to attempt to perform an accommodated job, which the employer had offered and which paid a comparable wage. In *Copeland*, for purposes of the wage loss prong of K.S.A. 44-510e, the Court held that workers’ post-injury wages should be based upon ability rather than actual wages when they fail to make a good faith effort to find appropriate employment after recovering from their injury. However, if there is a finding a worker made a good faith effort then the difference in pre- and post-injury wages based on the actual wages can be made.

Claimant testified she first looked for work after Dr. Eyster’s temporary restrictions expired and provided a list of approximately 50 prospective employers that she personally contacted in her job search. This evidence was uncontradicted. Moreover, the claimant testified when Dr. Eyster released her in September 1997, she contacted the respondent about returning to work and was advised there was no job for her. The claimant has met her burden of proof to establish that she has made a good faith effort to find employment and because she remains unemployed is entitled to a 100 percent wage loss.

¹*Foulk v. Colonial Terrace*, 20 Kan. App.2d 277, 887 P.2d 140 (1994), *rev. denied* 257 Kan. 1091 (1995).

²*Copeland v. Johnson Group, Inc.*, 24 Kan. App.2d 306, 944 P.2d 179 (1997).

A job task list for the 15-year period before claimant's work-related injury was prepared by Jerry Hardin after consultation with the claimant. The list comprised a total of 71 tasks. The court ordered independent medical examiner, Dr. Drazek, reviewed each of those tasks and concluded the claimant could no longer perform 18 of the 71 tasks. This computes to a 25 percent task loss. The Board is not unmindful that Dr. Zimmerman reviewed the same task list and concluded claimant could no longer perform 30 of the 71 tasks, however, in her brief to the Board the claimant conceded it is fair to adopt the neutral independent medical examiner's opinion and to affirm Judge Frobish's finding regarding task loss. Moreover, because the Board is adopting Dr. Drazek's functional impairment opinion and restrictions it likewise adopts her task loss opinion because it follows Dr. Drazek's restrictions. Accordingly, the Board concludes claimant has met her burden of proof to establish a 25 percent task loss.

Averaging the 100 percent wage loss with the 25 percent task loss, the claimant is entitled to a work disability of 62.5 percent.

Average Weekly Wage

It was undisputed claimant was earning \$7.50 an hour while employed by respondent. At the regular hearing the claimant testified she kept a diary in which she recorded the day she started working for the respondent and she further noted the number of hours she worked each day. Using the diary to refresh her memory, claimant testified her first day of work for respondent was April 10, 1997. Claimant then testified listing the number of hours worked each day during her employment with respondent.

Respondent's owner testified claimant did not start work until April 16, 1997. The owner further provided a pay stub indicating claimant had worked from April 16, 1997, through May 15, 1997. However, on cross-examination, the owner was unable to provide any documentation to refute the claimant's contention that she commenced work before that date. The owner was unable to provide the daily timecards and offered the opinion that they were provided to the Wage and Hour Board during a proceeding the claimant successfully instituted to recover overtime pay.

The Board adopts the Administrative Law Judge's finding that the best evidence of the claimant's average weekly wage was provided by the claimant. Accordingly, the Board adopts the Judge's determination that claimant's average weekly wage was \$363.81.

Additional Temporary Total Disability Compensation

The claimant contends she is entitled to additional temporary total disability compensation from October 31, 1997, through March 10, 1998. The Administrative Law Judge noted the record did not contain any medical opinion evidence taking claimant off work during the dates alleged. The Administrative Law Judge concluded that whether a worker is temporarily totally disabled must be established with medical evidence.

Accordingly, the Administrative Law Judge denied claimant's request for additional temporary total disability compensation.

In this jurisdiction it is not essential that the duration of disability or incapacity of an injured worker be established by medical testimony. *Hardman v. City of Iola*, 219 Kan. 840, 549 P.2d 1013 (1976). A claimant's testimony alone is sufficient evidence of the claimant's physical condition. *Hanson v. Logan U.S.D.* 326, 28 Kan. App.2d 92, 11 P. 3d 1184, rev. denied _____ Kan. _____ (2001). Medical evidence is not essential to the establishment of the existence, nature and extent of an injured worker's disability. *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976). Whether claimant was temporarily totally disabled during the time period alleged need not always be confirmed with medical evidence. Although it is routine and generally even advisable for a claimant to present competent medical evidence to establish the extent of disability, it is not required. *McKinney v. General Motors Corp.*, 22 Kan. App.2d 768, 921 P.2d 257 (1996).

In *Graff v. TWA*, 267 Kan. 854, 983 P.2d 258 (1999), the claimant testified that she was unable to work at her former job. In determining that claimant's testimony alone was sufficient to establish a work disability the Court stated:

Graff testified that she could not do the flight attendant work now or at the time she retired. In *Conner v. M & M Packing Co.*, 166 Kan. 98, 199 P.2d 458 (1948), the appellants contended that the evidence was insufficient to show claimant suffered any disability. The evidence consisted of the testimony of claimant, his wife, and his mother. The appellants' contention was based on the absence of medical evidence to support a finding of total disability. The court rejected the appellants' contention, stating: "This court has expressly held in repeated decisions that in this state, unlike some states, it is not essential that duration of disability *or incapacity* of an injured workman be established by medical testimony. [Citations omitted.]" 166 Kan. at 100.

In *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, Syl. ¶ 3, 547 P.2d 751 (1976), this court held: "The existence, nature and extent of the disability of an injured workman is a question of fact. Medical testimony is not essential to the establishment of these facts and it is not necessary that a workman's disability be given a medical name or label."

In *Armstrong v. City of Wichita*, 21 Kan. App.2d 750, Syl. ¶ 2, 907 P.2d 923 (1995), rev. denied 259 Kan. 927 (1996), the Court of Appeals extended this ruling to include claims for disability from an occupational disease: "The existence, nature, and extent of the disability of a worker suffering from an occupational disease is a question of fact. It is not necessary that a worker's occupational disease have a given medical name or label in order to be

compensable." Medical evidence is not essential or necessary to establish the existence, nature, and extent of a worker's injury. Here, Graff's testimony was sufficient to support an award. 267 Kan. at 863, 864.

The decision in *Graff* cited the *Conner* case which specifically determined that total disability could be determined without medical evidence.

Dr. Eyster, the authorized treating physician, concluded the claimant had reached maximum medical improvement and had not sustained any permanent impairment as a result of her work-related injury. He did so while at the same time continuing to impose temporary restrictions for an additional six months. The fact that Dr. Eyster continued claimant's temporary restrictions for six more months shows that claimant's condition was not stable and was not at maximum recovery at the time she was last seen by Dr. Eyster.

The claimant testified that when Dr. Eyster discontinued treatment she still was in pain and unable to work. The claimant testified she became frustrated with the authorized doctors telling her there was nothing wrong when she continued to experience pain. The claimant decided she would seek additional treatment even if she had to pay the medical bills. Accordingly, the claimant sought further treatment on her own and testified the doctor providing the treatment excused her from work during the time period from October 31, 1997, through March 10, 1998. Following the additional treatment, claimant's condition finally improved to the extent that she was able to begin seeking employment.

The trier of fact is not bound by the medical evidence or other controverted testimony presented in the case but has the responsibility of making its own determination as to which testimony is accurate or credible. *Tovar v. IBP, Inc.*, 15 Kan. App.2d 782, 817 P.2d 212, rev. denied 249 Kan. 778 (1991). The claimant's contention that she was unable to work was controverted by Dr. Eyster's conclusion that she had reached maximum medical improvement. Here again, when Dr. Eyster released claimant from his care it was with temporary, not permanent restrictions. Thus, although Dr. Eyster apparently believed claimant was not in need of additional medical treatment, he nevertheless believed her condition was not yet at its maximum point of recovery. As previously determined, the more persuasive evidence established claimant did sustain a permanent impairment contrary to Dr. Eyster's opinion. The facts further establish the additional treatment the claimant received, after Dr. Eyster discontinued treatment, enabled the claimant to improve sufficiently to resume attempts at finding employment. The Board concludes the more persuasive evidence supports the claimant's testimony that she was unable to work while receiving necessary additional treatment for her work-related injury.

Accordingly, the Board reverses the Administrative Law Judge's determination that claimant failed to meet her burden of proof that she was temporarily and totally disabled from October 31, 1997, through March 10, 1998.

AWARD

WHEREFORE, it is the finding, decision and order of the Board that the Award of Administrative Law Judge Jon L. Frobish dated November 2, 2000, is modified to award an additional 18.71 weeks of temporary total disability compensation but is otherwise affirmed.

The claimant is entitled to 37.71 weeks temporary total disability at the rate of \$242.55 per week or \$9,146.56 followed by 245.18 weeks at \$242.55 per week or \$59,468.41 for a 62.5 percent permanent partial general bodily disability making a total award of \$68,614.97.

As of September 28, 2001, there would be due and owing to the claimant 37.71 weeks temporary total compensation at \$242.55 per week in the sum of \$9,146.56 plus 193.58 weeks permanent partial compensation at \$242.55 per week in the sum of \$46,952.82 for a total due and owing of \$56,099.38 which is ordered paid in one lump sum less amounts previously paid. Thereafter, the remaining balance in the amount of \$12,515.58 shall be paid at \$242.55 per week for 51.60 weeks or until further order of the Director.

IT IS SO ORDERED.

Dated this _____ day of September 2001.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

DISSENT

The undersigned respectfully dissents from the opinion of the majority regarding claimant's entitlement to additional temporary total disability compensation. Claimant was referred to board certified orthopedic surgeon, Robert L. Eyster, M.D., for treatment of the injuries suffered on April 23, 1997. Dr. Eyster treated claimant, eventually returning her to work with temporary restrictions and finding claimant had reached maximum medical improvement.

Claimant then referred herself to Dr. Munhall for additional treatment. Claimant alleges entitlement to additional temporary total disability compensation from October 31, 1997, through March 10, 1998. The medical evidence of Dr. Eyster indicates that claimant had reached maximum medical improvement. While claimant sought treatment from Dr. Munhall, Dr. Munhall did not testify in this matter. There is therefore no medical opinion showing claimant to be temporary totally disabled during the period in question.

The majority cites several cases in support of its premise that medical evidence is not essential to establish the nature and extent or the existence of an injured worker's disability. In none of those cited cases, was the issue before the court the question of claimant's entitlement to temporary total disability compensation. In *Chinn v. Gay & Taylor, Inc.*, 219 Kan. 196, 547 P.2d 751 (1976), the question dealt with claimant's entitlement to a disability for a back injury resulting from an earlier injury to his left knee. In *Tovar v. IBP, Inc.*, 15 Kan. App.2d 782, 857 P.2d 212 rev. denied 249 Kan. 778 (1991), the dispute involved whether the fact finder was obligated to adopt the medical opinion of one the testifying physicians. The finder of facts in *Tovar* instead found a percentage of impairment between the opinions of the doctors who testified. The Court of Appeals in *Tovar* found that the fact finder was justified in so doing, holding that there was nothing in the record which "required the district court to adopt, as its finding, the testimony of the physicians for either party."

McKinney v. General Motors Corp., 22 Kan. App.2d 768, 921 P.2d 257 (1996) dealt with the admissibility of a medical opinion from an independent medical examination ordered by the administrative law judge. The dispute between K.S.A. 44-510e and K.S.A. 44-519 did not involve a question regarding a claimant's entitlement to temporary total disability compensation.

Rose v. Thornton & Florence Electric Co., 4 Kan. App.2d 669, 609 P.2d 1180 rev. denied, 228 Kan. 807 (1980) and *Crabtree v. Beech Aircraft Corp.*, 229 Kan. 440, 625 P.2d 453 (1981), neither of which were cited by the majority hold that an injury is no longer temporary when maximum recovery is reached or when the worker's condition becomes medically stationary or stable. The dispute in *Rose* specifically dealt with when temporary total disability ends and permanent disability begins. The Kansas Court of Appeals held that an injury is no longer temporary when the maximum point of recovery is reached or when the injured worker's condition becomes medically stationary or stable. *Id.* at 672.

In *Crabtree* the claimant, although continuing to experience pain, had refused an offered surgery which might have lessened her disability. As of the time claimant refused the surgery, the Court found that claimant was medically stable. As nothing further could be done, claimant was ready for a final award.

In this instance, claimant was found to have reached maximum medical improvement by her treating physician, Dr. Eyster. While claimant did continue in some pain, there is no medical evidence in the record to indicate claimant was "rendered completely and temporarily incapable of engaging in any type of substantial and gainful employment." K.S.A. 44-510c(b)(2). While claimant testified she was going to a doctor, that doctor did not testify. Claimant's self-serving comments regarding her situation should not carry sufficient weight to overcome the treating physician's testimony that claimant was at maximum medical improvement.

This Board member would therefore deny claimant the additional temporary total disability compensation from October 31, 1997, through March 10, 1998, as claimant has failed to prove entitlement to those benefits by a preponderance of the credible evidence, as required by K.S.A. 44-501 and K.S.A. 44-508(g).

BOARD MEMBER

c: Brian Pistotnik, Attorney for Claimant
Wade Dorothy, Attorney for Respondent and Insurance Carrier
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Workers Compensation Director